SUMMARY OF COOPERATIVE CASES

Prepared
Under the direction of
RAYMOND J. MISCHLER, ATTORNEY
OFFICE OF THE GENERAL COUNSEL, U.S.D.A.

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

LEGAL SERIES NO. 20

MARCH 1962

TABLE OF CONTENTS

The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

ANTITRUST LAW - RESTRAINT OF TRADE - RELEVANT COMPETITIVE MARKET

(Curly's Dairy, Inc., and Timber Valley Dairy, Inc., v. Dairy Cooperative Association, U. S. District Court, District of Oregon, Civil No. 60-319, decided January 19, 1962)

The plaintiffs in this case sought an injunction and a money judgment on the theory that the defendant had violated §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and § 3 of the Clayton Act (15 U.S.C. § 14). They alleged the defendant had for several years conducted an organized program for the lending of money in connection with which it had engaged in practices which would require borrowers to purchase 100% of their dairy requirements from the defendant as long as the indebtedness remained unpaid.

The court rendered its verdict for the defendant. It conceded that certain agreements or practices such as tying agreements are per se violations of the antitrust laws, but found that the contracts involved in this case were not tying agreements but were exclusive dealership or requirement contracts. Whether such contracts violated the antitrust laws, the court said, depended upon whether their effect was to foreclose competition from a substantial share of the commerce in question. The court concluded that the facts in this case failed to disclose such an effect.

The plaintiff, Curly's Dairy, Inc., (hereinafter referred to as Curly) is an Oregon corporation with its principal office and place of business in the City of Salem, Oregon. The plaintiff, Timber Valley Dairy, Inc., (hereinafter referred to as Timber Valley) is an Oregon corporation with its principal place of business in Lebanon, Oregon. These corporations operated under a common management.

The defendant, Dairy Cooperative Association, d/b/a/Mayflower (hereinafter referred to as Mayflower) is a cooperative association organized under the laws of the State of Oregon, with its principal office and place of business in the City of Portland, Oregon, and uses the trade name of "Mayflower".

Curley engaged in the business of purchasing, transporting, processing, distributing and selling, wholesale and retail, dairy products. The operations of Curly and Timber Valley were restricted to areas in the Willamette Valley, Oregon.

Mayflower owned and operated dairy products processing plants and facilities at various points in the States of Oregon and Washington; engaging in interstate commerce.

The court found on the evidence presented that Mayflower held eight mortgages which contained a clause which would require the borrower to purchase 100% of its dairy requirements from Mayflower as long as the debt remained unpaid. One chattel mortgage required the purchase of 80% of the borrower's dairy requirements. In approximately 15 transactions certain loan applications contained a notation "100% Mayflower". The weight of the evidence, according to the court, was that this notation merely indicated that the customer was already a 100% customer of Mayflower. In any event, neither the promissory note nor the conditional sales contract which formalized the transaction contained language which would indicate an exclusive arrangement.

The plaintiffs took the position that these agreements, considered separately and taken together with Mayflower's practices in relation to the lending of money, were unreasonable per se and unreasonable quantitatively in that they:

(a) directly and systematically forclosed competition in a not insignificant part of commerce and trade;

(b) constituted an attempt to systematically monopolize a not insignificant part of commerce and trade and were entered into in pursuance of an unlawful purpose;

(c) constituted an attempt to induce plaintiffs' customers to discontinue dealing with plaintiffs for reasons and considerations wholly unrelated to the comparative quality, attractiveness or competitive merit of defendant's products and are entered into in pursuance of an unlawful purpose;

(d) constituted an attempt to induce merchants to refrain from dealing with plaintiffs for reasons and considerations wholly unrelated to the comparative quality and competitive merit of defendant's products in relation to plaintiffs' products and were entered into in pursuance of an unlawful purpose; and

(e) constituted an aggressive and excessive use of an otherwise legitimate business practice, i.e., the lending of money, for the primary purpose of gaining an unlawful collateral advantage tending to create a monopoly in a not insignificant part of commerce and trade.

The court asserted that the evidence showed that the plaintiffs had increased their share of the dairy business in the Salem-Lebanon

area during the period in question and that during the same period the business of Mayflower had gradually declined. In most cases, the request for financing had been initiated by the customer and not by Mayflower. Of a total of 329 grocery outlets in the Salem-Lebanon area, only 5 signed the 100% mortgage, approximately 1.5% of the total; 26 of the restaurants in the same area obtained financing, but only three of these executed chattel mortgages containing the 100% clause. The remaining 23 transactions were in the form of conditional sales contracts, none of which contained the 100% clause. Eighteen of these were for ice cream equipment and eight for milk dispensers. In that area there were 353 restaurants; therefore the restrictive agreements would apply to less than 1% of the total. There was no evidence that a large volume of dairy products was sold through these restricted outlets.

The Court conceded that certain agreements or practices are per se unreasonable restraints on competition and that proof of their existence is sufficient to show a violation of the Sherman and Clayton Acts without further inquiry into the economic effects of such agreements or practices. Among these are what are known as tying agreements. Northern Pacific Railway Co. v. United States, 356 U. S. 1. In the case here under consideration, the Court said, a different type of contract known as an exclusive dealership or requirements contract was involved.

As to the applicability of section 3 of the Clayton Act, the plaintiffs relied on Standard Oil Company of California v. United States, 337 U.S. 293, (1949) and other cases. Standard Oil dealt with exclusive dealership contracts for oil products. The Court observed that in the Standard Oil case the decision distinguished exclusive dealership contracts from tying agreements by recognizing that under certain circumstances the exclusive dealership contracts might be economically justified as beneficial to the public, while tying agreements could never have such a result. The Court noted that each exclusive dealership or supply contract limits competition to some extent and that the question was whether the facts of this case showed that the effect of the contracts was to foreclose competition from a substantial share of the commerce in question.

The Court stated that the decision of Tampa Electric Co. v. Nashville Coal Co. 365 U.S. 320 (1961) held that in weighing the probable effect of the contract on the relevant area of effective competition the trial court should take into account three factors: (1) the relative strength of the parties; (2) the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area; and (3) the probable immediate and future effects which pre-exemption of that share of the market might have on effective competition therein. In applying the test announced in the Tampa case to the facts in this case the Court concluded that: (1)Mayflower

did not occupy a dominant position in the relevant market area; (2) it did not have myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying on exclusive contracts, as was presented in Standard Oil; and (3) a clearly restrictive tying agreement did not appear to be involved.

The court concluded that in viewing the small number of exclusive contracts in the light of the huge competitive area involved, there was nothing to point to a violation of either the Clayton Act or the Sherman Act. The court asserted that under the factual background of this case there could be no violation of sections 1 and 2 of the Sherman Act if there were no violation of the Clayton Act, and that Mayflower had violated neither of these acts.

# # #

TAXATION - PATRONAGE REFUNDS - ORAL PRE-EXISTING LEGAL OBLIGATION

(Georgetown Farmers Elevator Co. v. U.S., 8AFTR 2d, 5549, U.S.D.C. for the Dist. of Minn., Sixth Div., No. 6-60 Civil 109. June 27, 1961)

The plaintiff, Georgetown Farmers Elevator Co., a farmer co-operative association (hereinafter referred to as Georgetown) brought this action to recover approximately $17,000 in taxes which it paid to the United States.

The court held that the pre-existing legal obligation to pay patronage refunds required to exempt farmer cooperatives from the payment of taxes on the amount of such refunds need not be in writing or embodied in the bylaws or articles of incorporation of the association but could arise by oral communication between the officers of the association and its shareholders and patrons.

Georgetown distributed about $175,000 over a 12-year period to its patrons, but the only years involved in this case were for 1945 and 1956. Georgetown contended that the money actually belonged to its patron farmers, whereas the contention of the Internal Revenue

Service was that it belonged to Georgetown from the time it was received until the distribution of the refunds was declared and that, therefore, Georgetown was liable for the tax on such funds.

The court charged the jury that the law is that if at the time Georgetown bought the grain from its farmer-patrons it was legally obligated to pay patronage refunds in some definite amount or in accordance with a definite plan or formula, the funds in question would not constitute taxable income of Georgetown. The court advised further that such a legal obligation does not necessarily have to be reflected in terms of any kind of written contract or be expressed in the bylaws or the articles of incorporation. The court held that it would constitute a legal obligation if it arose as testified by the president of Georgetown, by virtue of oral communication between the officers of the cooperative and its various shareholders and patrons.

The Internal Revenue Service contended that the alleged agreement was too indefinite to constitute a valid binding pre-existing agreement.

The jury found for the Georgetown Elevator Company. The Internal Revenue Service moved for judgment notwithstanding the verdict or, in the alternative, for a new trial and requested permission to file a brief within 30 days. The latter request was granted.

# # #

MOTOR CARRIERS - SCOPE OF "AGRICULTURAL COOPERATIVE"

EXEMPTION OF SECTION 203(b)(5) OF THE

INTERSTATE COMMERCE ACT

(No. MC-C-2488, Machinery Haulers Association et al., v. Agricultural Commodity Service
No. MC-C-2488, (Sub-No.(1))Midwest Coast Transport, Inc. et al., v. Agricultural Commodity Service
No. MC-C-2576, Agricultural Commodity Service - Investigation of
Decided May 3, 1961, petition for reconsideration denied January 1, 1962; Motion to stay cease and desist order denied January 31, 1962, 14 Fed. Carriers Cases, Par.35,155 (p. 40, 489))

This order of the Interstate Commerce Commission resulted from complaints that the defendant, the Agricultural Commodity Service

(hereinafter referred to as ACS) Robert Crawford, and certain other named defendants and respondents were engaged in the transportation of property in interstate or foreign commerce as for-hire carriers by motor vehicle in violation of Section 206(a) or 209(a) of the Interstate Commerce Act."

The primary question presented was whether the operations of ACS and its agents were within the scope of the partial exemption of section 203(b)(5) of the Interstate Commerce Act relating to "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act."

Actually three cases involving related issues were heard on a consolidated record, were the subject of a single report, and recommended order by an examiner, and were disposed of in this single report. The examiner found that the considered transportation by ACS and its named agents constituted for-hire transportation by motor vehicle which was not subject to the exemption provisions of section 203(b)(5) and he recommended that a cease and desist order be entered against ACS and its agents. The Commission also held that ACS did not come within the exemption of section 203(b)(5) and that other named defendants and respondents were engaged in transportation in violation of the Interstate Commerce Act, but the Commission's conclusions differed somewhat from those recommended by the examiner.

While an officer of the Black Angus Breeders Association and a number of other farmers apparently conceived the idea of creating ACS as an agricultural cooperative, certain truckers, each of whom had performed transportation as agents of similar associations in the past, participated in the organization of ACS from its very inception, became either officers or directors of the association, and actively promoted the operations here under consideration. ACS maintained an office at Bloomington, Illinois, from which it carried on its activities. It did not operate in the manner usually associated with the business of farm cooperatives in serving a group of farmers; rather, its primary function admittedly was the performance of for-hire transportation by motor vehicle. It did not own any motor vehicles and the transportation was rendered with equipment ostensibly leased by ACS from certain truckers, also defendant-respondents herein, who purportedly acted as its agent at various points in Illinois, Iowa, Texas and California.

The activities and operations of the defendant-respondent, Robert Crawford of Council Bluffs, Iowa, according to the Commission's findings, were typical. He held intrastate authority in Iowa, maintained offices at Council Bluffs, Fort Worth, Texas and Los Angeles, Calif., and operated approximately 65 refrigerated tractor-trailer units, most of which were leased from owner-operators thereof. All drivers were

supervised by Crawford or by his dispatchers. Crawford maintained separate accounts at a local bank in Council Bluffs, one in his own name and the other in the name of ACS. All transportation revenues were deposited in the ACS account. Owner-operators were paid 85 per cent of the revenue, and from 1 to 2 per cent of the remaining income was remitted to ACS at Bloomington. When the transportation was performed by vehicles owned by Crawford, however, 85 per cent of the revenue derived therefrom was transferred from the ACS account to Crawford's account from which his drivers were then paid. Generally, the owner-operator paid all vehicle maintenance costs, fuel taxes, and State license fees, as well as certain claims for shortages in, or damages to lading.

The Commission's Bureau of Inquiry and Compliance (hereinafter referred to as the Bureau) contended that ACS was not entitled to the partial exemption provided by section 203(b)(5), and that the evidence abundantly established that the alleged agents of ACS were, in fact, conducting their own independent trucking operations without appropriate authority therefor.

The Secretary of Agriculture took no position with respect to the examiner's ultimate conclusion that the defendants were engaged in, and must cease and desist from unlawful transportation activities. Rather, he largely took issue with the reasons underlying that decision, contending that the applicability of the partial exemption claimed by defendants could not be decided properly by a mere consideration of the types of commodities being transported or their origins and destinations. The Secretary maintained that a cooperative association as defined in the Agricultural Marketing Act must be an association in which member-farmers act together for their mutual benefit as producers of agricultural products or purchasers of farm supplies; that such an association must be substantially owned and controlled by producers of agricultural products; that a corporate producer may qualify as a member with respect to those farm products which it actually produces, or in respect to those farm supplies which are used in the conduct of its farm operations; that when these standards are met, a cooperative may haul for nonmembers within the volume limits established in the Agricultural Marketing Act provided that such transportation is reasonably incidental to the cooperative's proper purposes; and that the transportation of farm products, farm supplies, or other commodities encompassed by the furnishing of a farm business service may be engaged in by a cooperative even though the points of origin or destination may not be a farm or cooperative, and even if some of the purchasers of these commodities are not farmers.

The so-called "agricultural cooperatives" exemption provided by section 203(b)(5) of the Act reads as follows:

> "Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees, and safety of operation or standards of equipment shall be construed to include . . . (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purpose than cooperative associations so defined."

The Commission asserted that the answer to the primary question presented depended upon the following issues:

1. What are the criteria which must be met by an association in order to qualify as a "cooperative association" entitled to the partial exemption here under consideration?

2. Are the transportation services of an agricultural cooperative association exempt from economic regulation regardless of the commodities handled or the origins and destinations of the traffic?

3. What standards are to be utilized in determining whether the motor vehicles in question are, in fact,"controlled and operated" by the cooperative association claiming the statutory exemption?

Regarding the first issue the partial exemption is available only to cooperative associations defined in section 15(a) of the Agricultural Marketing Act of 1929, as amended, (12 U.S.C.A. 1141j). A cooperative association as defined by the Act must be an organization of member-farmers who act together for their mutual benefit as producers of farm products or as purchasers of farm supplies and farm business service. The term "farmers" includes individuals, corporations, partnerships, and other business entities. Such persons must be engaged, at least to some extent, in a common pursuit - farming - in order to qualify for membership in a lawfully constituted cooperative. Those not engaged in agrarian activities and having no agricultural production whatever, clearly are not eligible for membership even though farm products may be utilized by such persons as raw materials in their manufacturing process.

The Commission asserted that neither the Marketing Act nor the legislative history thereof justified the conclusion that persons who

market or distribute products manufactured from farm products, such as meat packing-houses, canneries, and the like, may qualify for membership in a cooperative association on that basis alone, but that in order to be eligible for membership in a cooperative association as defined in the Agricultural Marketing Act, such persons must be engaged in some respect in farming operations. Otherwise, according to the Commission, all persons engaged in handling or processing food products at any intermediate step between farmer and ultimate consumer might qualify for such membership, and there would then be virtually no limitation upon those who may become members.

With respect to those who can qualify as farmers in some degree, but who have other activities which, in many instances, constitute the principal business in which they are engaged, the defendants and the Secretary of Agriculture generally took the position that such persons are "farmers" within the meaning of the Agricultural Marketing Act, and that they, therefore, may become lawful members of a cooperative association. The complainants and the Bureau, on the other hand, contended that a person must be primarily engaged in farming operations in order to be eligible for membership. The Commission agreed with the contention of the Secretary of Agriculture that persons engaged in farming operations, either as actual producers of agricultural products or as farm owners, may qualify for membership in a cooperative association even though such farming operations may not constitute the primary business in which they are engaged.

The Commission concluded, however, that in situations where one or more of a number of affiliated persons, corporate or otherwise, qualify as "farmer" within the meaning of the Agricultural Marketing Act, only those persons so qualifying are eligible for membership in a cooperative association; and that affiliated or controlling corporate or natural persons not so qualifying may not become lawful members in the association on the basis of such affiliation or control alone. The Commission decided that the apparent membership in a cooperative association of persons who may not qualify as "farmers" does not automatically change the status of such association, provided that the association continues to be substantially owned and controlled by qualifying members.

The Agricultural Marketing Act further provides that the value of business handled by a cooperative association for or with nonmembers shall not exceed that transacted by such association for or with its eligible members. According to the Commission this requirement pertains not only to all transportation services rendered by a cooperative but, in addition, to all farm products, farm supplies, and farm business services dealt in by the assiciation. Hence, a preponderance of a cooperative's transportation activities might be performed for nonmembers without altering the association's status,

provided, that the value thereof is offset by the value of other types of business which it handles for or with members. Moreover, the Commission contended that the evidence must be established that such association, as a general and continuing practice, does not conduct nonmember business greater in value than that performed as agent for its own members.

Having determined the essential attributes which must be possessed by a cooperative association as defined by the Agricultural Marketing Act, the Commission next considered the problems regarding the nature and extent of the transportation services which lawfully may be provided by such an association pursuant to both the Marketing Act and the Interstate Commerce Act.

With respect to this problem, the complainants, the interveners in support of complainants, and the Bureau generally contended that in order to be a legitimate activity of a cooperative, the transportation must constitute a "farm business service," and, as such, must connect either at origin or destination with a farm or a farmers' cooperative. ACS and its agents argued, on the other hand, that if the evidence established that a cooperative met the definition of the Marketing Act, all transportation service rendered by such association was exempt from economic regulation so long as its nonmember business was not greater in value than the total business transacted by it with its members. The position of the Secretary of Agriculture was somewhere between these two extremes. He asserted that a lawfully constituted cooperative may engage in for-hire transportation for nonmembers where such transportation is reasonably incidental to a cooperative's proper corporate purposes; and that a cooperative may transport farm products, farm supplies, or other commodities encompassed by the furnishing of a farm business service even though they do not originate at and are not destined to a farm or a cooperative, and even if some of the purchasers of these commodities may not be farmers.

The Commission decided that, in order to be exempt from economic regulation, transportation by a cooperative for or on behalf of a person who may qualify as a member, but who has other business activities not connected with farming, must be functionally related to that person's operations as a "farmer" as defined above, regardless of the type of commodities transported and the origins and destinations thereof, and that, therefore, back-hauls are not exempt from economic regulation unless directly essential to the activities of the members of the cooperative in their capacities as producer of farm products, or as purchasers of farm supplies and farm business service.

With respect to the third issue as to whether motor vehicles are in fact controlled and operated by a cooperative association claiming the exemption, the Commission concluded that in order for the

motor vehicles to be controlled and operated by a cooperative association, within the meaning of the partial exemption of section 203(b)(5):

1. the motor vehicle either must be owned by the cooperative association, or it must be in the lawful possession thereof and be used and operated by such association as if it were, in fact, owned by the cooperative; and

2. the driver of the vehicle must be a bona fide employee of the cooperative association, and must possess no duties, obligations, responsibilities, or interests inconsistent with its obligations to the association.

Applying the above-stated general principles to the facts presented in the instant proceedings, the Commission ruled that the motor-carrier operations of ACS and its agents were not within the scope of the partial exemption here in question and recommended that a cease and desist order be issued in connection with the improper transportation with respect to these cases. The cease and desist order of May 3, 1961, which was later postponed was reinstated and the statutory effective and compliance date was fixed as February 19, 1962.

# # #

MEMBERSHIP OF CITY IN RURAL ELECTRIC MEMBERSHIP CORPORATION

(Georgia Power Company v. Okefenokee Rural Electric Membership Corporation. 121 S.E. 2d, 777 (1961))

This case arose in connection with action undertaken by the Georgia Power Company (hereinafter called the Company) a public utility under the jurisdiction of the Georgia Public Service Commission to enjoin the Okefenokee Rural Electric Membership Corporation (hereinafter called the Cooperative) in furnishing electric energy to the City of Folkston (hereinafter referred to as the City) for street lighting purposes in an area which was annexed to the City in 1951.

In reversing the judgment of the Superior Court, Brantley County, which had denied the Company's petition for interlocutory injunctive relief, the Supreme Court of Georgia held:

(1) the Company had sufficient interest in the alleged contract between the City and the Cooperative to give it the right to challenge the lawful power of the Cooperative to enter into the street lighting contract, and

(2) the contract between the City and the Cooperative for electric street lighting in the annexed area was not authorized or permitted under the provisions of the Georgia Act of 1937, as amended (known as the Electric Membership Corporation Act).

The Company was granted a franchise by the City to use and occupy its streets for the purpose of supplying electric energy to the City and its inhabitants in 1957. In February 1960, the City and the Company entered into a contract whereby the Company agreed to furnish to the City and the City agreed to receive electric energy for street lighting purposes for a period of 5 years with terms and rates as provided in the agreement. In 1951 a rural area was annexed to the City. At that time the Cooperative had electric lines and was servicing customers in the annexed area. In July 1960 the City informed the Company and the Cooperative of its desire to install additional street lighting. The Company notified the Cooperative that they could not lawfully furnish electric energy to the City because the City was not eligible to become a member of the Cooperative.

On September 13, 1960, the City granted a franchise to the Cooperative to occupy a certain street and highway in that portion of the area annexed in 1951, for the purpose of installing and operating a street lighting system in the annexed area. On the same date the City and the Cooperative entered into a contract whereby the Cooperative, for a period of 10 years, agreed to construct, maintain, operate and furnish all the electric energy necessary for street lighting purposes in the annexed area, and the City agreed to pay according to a rate schedule.

In connection with the right of the Company to challenge the lawful power of the Cooperative to enter into the street lighting contract, the Court construed the allegations of the petition to mean that the Company was not challenging the right of the City to grant a franchise to the Cooperative but the right of the Cooperative under its statutory and corporate powers to accept the City, or serve it, as a member of the Cooperative.

The Court observed that as a general rule the State alone will be heard to complain of a corporation's not conforming to the terms of its charter, or, in all events, the Attorney General, either as a plaintiff or defendant, must be a party to the suit. The Court held that there was an exception to this rule where as here the immediate interest involved and sought to be protected, is not that of the general public but the special and peculiar interest of the complaining party.

The Act of 1937, as amended, under which the Cooperative was incorporated, provides that cooperative corporations organized thereunder are authorized to furnish "electric energy to persons in rural areas who are not receiving electric service from any corporation subject to the jurisdiction of the Georgia Public Service Commission, or from any municipal corporation." It also provides that "all persons in rural areas proposed to be served by the corporation who are not receiving electric service from any corporation subject to the jurisdiction of the Georgia Public Service Commission or from any municipal corporation, shall be eligible for membership in a corporation organized under this Act."

The Court pointed out at the time the Cooperative entered into the street lighting contract the City was receiving electricity, not only for street lights, but for other municipal purposes from the Company and, therefore, was not eligible for membership in the Cooperative. The Court observed that a subsequent act of 1960 did not modify or change the eligibility requirement as to membership as provided in the Act of 1937 but simply provided that when a rural area wherein a cooperative is furnishing electric energy to its members is annexed to a city, the cooperative has the right to continue such service to member consumers with certain restrictions.

The Court also held that under the evidence a finding was not warranted that the Company was guilty of laches.

# # #

SALES TAX - MINK RAISING NOT AGRICULTURE

(Commonwealth v. Western Pennsylvania Fur Farmers Cooperative Association. 77 Dauphin County Reports, p.276 (1962))

This was an appeal by the Western Pennsylvania Fur Farmers Cooperative Association from a decision of the Board of Finance and Revenue not to review the imposition of a sales tax on the sale of feed and supplies to its members. The Cooperative was formed by a group engaged in the commercial raising of mink. It sold feed and supplies to its members and it contended that such sales were exempt from the Pennsylvania Selective Sales and Use Tax because: (1) the raising of mink is "farming" or "agriculture" within the contemplation of the Sales Tax Act, and (2) sales of feed to fur raisers was a "sale for resale."

The Court held that the Cooperative was liable for the tax since the raising of mink for their pelts was not "farming" within the contemplation of the Act and further the sale of food was not a "sale for resale" as designated by the legislature.

The assessment of the sales tax involved was, in large part, imposed with respect to animal feed sold by the cooperative to its members and fed by them to their mink but it also included a small amount of sales tax imposed with respect to certain materials and supplies sold by the cooperative to its members. The mink were raised for the sole purpose of obtaining their pelts. The sales tax was imposed upon each separate sale at retail of tangible personal property but the statute provided that "sale at retail" did not include any transfers for the purpose of resale or the transfer of tangible personal property to be used or consumed directly in "(2) farming, dairying, agriculture, horticulture, or floriculture when engaged in as a business enterprise." "Resale" was defined in pertinent part as "(2) the physical incorporation of personal property as an ingredient or constituent into other personal property which is to be sold in the regular course of business."

Cases were cited involving an interpretation of the words "agriculture," "farming," and related words where they had been used, as in this case, in statutes which did not define them. It was noted that these terms are usually used by the legislature in their popular sense when not defined and that such use seemed particularly apparent in this case since the word "farming" in the statute was followed by the words "dairying, agriculture, horticulture, and floriculture." One case cited by the court was Spohn v. Brown, 26 D & C 534 (1936), which held that the raising of silver fox for their pelts did not constitute agriculture. The Court stated also that the raising of corn, wheat, and other food crops, tilling of the soil to produce tobacco, cotton and the like, and the raising of animals useful to man as food or for use in the tilling of the soil would be farming but that the mere raising of any kind of animal for profit, even domesticated animals, would not necessarily constitute farming.

The court said that unlike animals generally considered to be "farm animals" mink are raised in separate cages, they are carnivorous animals, and their food is not produced at the place where they are raised, but is purchased. The court also concluded that mink are not "livestock" as that term is commonly used. A mink is not tame by nature whereas "livestock" is quite commonly thought of as including the more ordinary forms of domesticated animals, such as cattle, sheep, hogs and horses. The court decided, therefore, that the business of breeding and raising mink did not constitute "farming" or "agriculture" within the meaning of the Selective Sales and Use Tax Act.

The court further held that sales of mink feed supplied to individuals raising mink for their pelts which in turn were sold by such individuals did not, as the cooperative contended, constitute sales for resale since it was clear that a sale of a pelt was not the sale of the feed and supplies used in producing the pelt.

# # #

MOTOR CARRIER ACT - PRIVATE CARRIAGE

vs.

CONTRACT CARRIAGE

(United States of America, et al., v. Henry E. Drum, et al.
368 U.S. 370 Decided January 15, 1962)

In an investigation initiated by it, the Interstate Commerce Commission held that the driver-owners, appellees, who leased their motor vehicles and hired their services as drivers to the Oklahoma Furniture Manufacturing Company (hereinafter referred to as Oklahoma) were contract carriers within 49 U.S.C. § 303(a)(15) and subject to the Motor Carriers Act's permit requirements. (49 U.S.C.§309(a)(1)). (79 M.C.C. 403). The Commission entered an order requiring the driver-owners to cease and desist from their operations unless and until they should receive appropriate authority from the Commission.

The driver-owners then brought action in the U. S. District Court for the Western District of Oklahoma to set aside the cease and desist order. The District Court set aside the ICC's order on the ground that Oklahoma was engaged in private carriage under 49 U.S.C.303(a)(17), rather than contract carriage (193 F. Supp. 275).

The Supreme Court of the United States reversed the decision of the District Court and held that the Commission was not limited, in its determination of whether the use involved private or contract

carriage, to the test of whether any person other than Oklahoma had any right to control, direct, and dominate the transportation, but could find the driver-owners to be contract carriers if they were "in substance" engaged in the transportation of property for hire.

Having discovered that some of its drivers were misusing its credit cards, and being of the opinion that its equipment was too often involved in accidents, and too often in need of repairs and maintenance, Oklahoma entered into an arrangement with its long-haul drivers. The Commission's ruling resulted from this arrangement under which the drivers became the owners of the trailer-truck tractors and leased the tractors to Oklahoma. Oklahoma hired the tractors and the driver-owners on a mileage basis, without any guaranty of minimum mileage. Oklahoma had the sole right to control the use of the tractors through the drivers. It paid for public liability and property damage insurance, conducted safety inspections, closely directed all details of loading and delivery routes, instructed drivers regarding steps to be taken in emergencies, administered physical examinations, supervised the preparation of reports required by the Commission, paid social security taxes, withheld income taxes, and provided workmen's compensation. The drivers, as owners of the tractors, bore operating maintenance costs and the risk of depreciation and damage, but were covered by a collective bargaining agreement, which gave them seniority rights, death benefits, immunity for discharge except for cause, military service protection and vacation pay. The owner-drivers were required to maintain their trucks in good running condition at all times and they were required to pay for all repairs.

The decision of the Supreme Court observed that the Motor Carrier Act of 1935 subjected many aspects of interstate carriage - including entry of persons into the business of for-hire motor transportation and the oversight of motor carrier rates - to administrative controls. Congress took cognizance of a shipper's interest in furnishing his own transportation, and limited the application of the licensing requirements to those persons who provide "transportation . . . for compensation" or, under a 1957 amendment, "for hire transportation". Therefore, the I.C.C. has to determine whether a particular arrangement gives use to that "for-hire" carriage, or whether it is, in fact private carriage. This case involved such a determination.

The Supreme Court noted that the primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal, stated the court,

not only of Commission surveillance of licensed motor carriers as to the rates and services, but also of the requirementthat the persons from whom shippers would purchase a transportation service designed to meet the shippers' distinctive needs first must secure Commission approval. The statutory requirements that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the majority of shippers must depend for access to market. Thus, according to the Court, referring to "for compensation" or "for hire" transportation, the definitions of the Act, must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry. They are to be interpreted in a manner which transcends the merely formal. From the outset, the opinion states, the Commission has correctly interpreted the definitions as importing that a purported private carrier who hires the instrumentalities of transportation from another must - if he is not to utilize a licensed carrier - assume in significant measure the characteristic burdens of the transportation business.

The Court considered that because of its desire to rid itself of its existing transportation operation Oklahoma had entered into the arrangement detailed above. The Court observed that Oklahoma's operation under the arrangement possessed a number of hallmarks of a genuine lease of equipment and a genuine employment arrangement. However, Oklahoma was able to spare itself - and pass over to the owner-operators - certain characteristic burdens of the transportation business, such as the large capital investment in the tractors, the risk of their premature depreciation or catastrophic loss, the risk of a rise in variable costs such as fuel, and repairs and maintenance of the tractors in good operating condition.

The Court concluded and agreed with the ruling of the Commission that under the particular facts of Oklahoma's arrangement with the owner-drivers, Oklahoma had sufficiently emancipated itself from the burdens of transportation so that it would be inconsistent with the statutory scheme to permit it to secure transportation service from these unlicensed owner-operators.

The District Court had reversed the Commission's conclusion relative to shipper control and this point was not challenged by the Commission on this appeal. The Supreme Court said that although "control" had been the focus of the Commission's efforts to delineate verbally the permissible area of nonlicensed leases of transportation equipment, a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor . The Commission's initial technique was to assess the lessee-shippers assumption of the burdens of transportation in terms of the degree to which he undertook to "control" or "dominate" it, but the Commission reports have

taken note of various factors which clearly transcend any narrow concept of physical direction of the details of the operation. It has always been apparent that the vesting of such physical "control" in the shipper would not in itself suffice to render the transportation private carriage.

The Supreme Court further stated that the Commission has begun to move away from "control" as the verbal embodiment of its manifold inquiry and thus accord explicit recognition to a premise which has long been implicit in its decisions: "That some indicia of private carriage may be assumed and detailed surveillance of operations undetaken without the shipper's having significantly shouldered the burdens of transportation."

The Court concluded that the test of substance with which the Commission has supplemented its "control" inquiry was a proper exercise of administrative discretion and that it was evident that the Commission refused to allow Oklahoma the status of a private carrier because of its belief that financial risks are a significant burden of transportation and its belief that such risks had been shifted by Oklahoma to the owner-operators to an extent which rendered the sanctioning of the operation as a private carriage a departure from the statutory design.

The opinion states that such conclusions were well within the range of the responsibility Congress assigned to the Commission. Further, that if the basis for the reversal of the District Court was to confine the Commission to the "control" test, it was in error, and, if, on the other hand the District Court meant to substitute its judgment for the Commission's on the question of substance, it indulged in an unwarranted incursion into the administrative domain.

# # #